

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Implementation of Section 621(a)(1) of the Cable	)	MB Docket No. 05-311
Communications Policy Act of 1984 as Amended	)	
by the Cable Television Consumer Protection and	)	
Competition Act of 1992	)	

**ORDER DENYING MOTION FOR STAY**

**Adopted: November 6, 2019**

**Released: November 6, 2019**

By the Chief, Media Bureau:

1. On August 2, 2019, the Commission released its Third Report & Order (*Order*) in the above-captioned proceeding.<sup>1</sup> After the rules adopted in the *Order* took effect,<sup>2</sup> the National League of Cities and a group of local government associations (collectively, NLC) filed a Motion for Stay of the *Order* pending judicial review (Motion).<sup>3</sup> For the reasons discussed below, we deny the Motion.

**I. BACKGROUND**

2. In the *Order*, the Commission adopted rules<sup>4</sup> and interpreted provisions in Title VI of the Communications Act of 1934, as amended (the Act), that govern how local franchising authorities (LFAs) may regulate cable operators and cable television services, with particular focus on issues remanded from the United States Court of Appeals for the Sixth Circuit (Sixth Circuit) in *Montgomery County, Maryland et al. v. FCC*.<sup>5</sup> First, the *Order* adopted a rule requiring that cable-related, “in-kind” contributions required by a cable franchise agreement are franchise fees subject to the statutory five percent cap on franchise fees codified in section 622 of the Act,<sup>6</sup> with limited exceptions. One notable exception is the one for certain capital costs related to public, educational, and governmental access (PEG) channels.<sup>7</sup>

<sup>1</sup> *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as Amended by the Cable Television Consumer Protection and Competition Act of 1992*, Third Report and Order, MB Docket No. 05-311, 34 FCC Rcd 6844 (2019).

<sup>2</sup> *Effective Date Announced for Rules Governing Franchising Authority Regulation of Cable Operators*, Public Notice, MB Docket No. 05-311, 34 FCC Rcd 7753 (MB 2019) (Effective Date Public Notice).

<sup>3</sup> National League of Cities, *et al.* Motion for Stay, MB Docket No. 05-311 (filed Oct. 7, 2019), available at <https://ecfsapi.fcc.gov/file/100832956088/FCC%20Motion%20for%20Stay%20621%20Order.pdf>. See *id.* at 1 n.1 (listing parties joining the motion). NCTA – The Internet & Television Association (NCTA) filed an opposition to the Motion. NCTA Opposition to the Motion for Stay of the National League of Cities, *et al.*, MB Docket No. 05-311 (filed Oct. 15, 2019), available at [https://ecfsapi.fcc.gov/file/101554671244/NCTA%20Section%20621%20Stay%20Opposition%20\(10-15-19\).pdf](https://ecfsapi.fcc.gov/file/101554671244/NCTA%20Section%20621%20Stay%20Opposition%20(10-15-19).pdf).

<sup>4</sup> 47 CFR §§ 76.42, 76.43.

<sup>5</sup> *Montgomery County, Md. et al. v. FCC*, 863 F.3d 485 (6th Cir. 2017) (*Montgomery County*).

<sup>6</sup> 47 U.S.C. § 542.

<sup>7</sup> *Order*, 34 FCC Rcd at 6849-58, paras. 9-24 (Part III.A.1). The Commission’s rules include, as franchise fees subject to the five percent cap, (i) costs attributable to franchise terms that require free or discounted cable service to public buildings; (ii) costs in support of PEG access, with the exception of capital costs; and (iii) costs attributable to the construction of I-Nets. Build-out and customer service requirements were excluded from the cap, and the record was insufficient to determine whether the provision of PEG channel capacity is included within the cap. *Id.* at 6859- (continued....)

Second, the Commission concluded that the Act precludes LFAs from regulating the provision of most non-cable services (including broadband Internet access service) that incumbent cable operators provide over their cable systems, and adopted a rule implementing that statutory prohibition.<sup>8</sup> Third, the Commission determined that the Act preempts any state or local regulation of a cable operator's non-cable services that would impose obligations on franchised cable operators beyond what Title VI of the Act allows.<sup>9</sup> Finally, the Commission determined that its rules governing LFA regulation of cable operators should extend to state-level franchising actions and state regulations that impose requirements on local franchising.<sup>10</sup>

3. The Commission released the full text of the *Order* on August 2, 2019. The Federal Register published a summary of the *Order* on August 27, 2019,<sup>11</sup> and the *Order* became effective on September 26, 2019.<sup>12</sup> Parties have filed petitions for judicial review of the *Order* in the United States Court of Appeals for the Third,<sup>13</sup> Ninth,<sup>14</sup> and D.C. Circuits.<sup>15</sup>

## II. DISCUSSION

### A. The Stay Motion Is Procedurally Defective

4. We deny the Motion because it is moot. NLC seeks “a stay of the *Order* pending judicial review.”<sup>16</sup> Because the rules adopted in the *Order* took effect on September 26, 2019, those rules can no longer be stayed.<sup>17</sup>

5. For the same reason, NLC's delay in filing the Motion undermines its assertion that LFAs face imminent irreparable harm without a stay.<sup>18</sup> Notwithstanding that the Commission released the full text of the *Order* on August 2, 2019, NLC elected not to request a stay until October 7, 2019 – two months after the *Order* was released, and two weeks after the rules took effect. NLC provides no explanation for its delay in seeking equitable relief.<sup>19</sup> Given NLC's failure to request a stay before the

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76, paras. 25-58 (Part III.A.2). See also 47 CFR § 76.42. The Commission concluded further that cable-related, in-kind contributions must count toward the five percent franchise fee cap at their fair market value. *Order*, 34 FCC Rcd at 6876-78, paras. 59-63 (Part III.A.3).

<sup>8</sup> *Id.* at 6879-89, paras. 64-79 (Part III.B). See also 47 CFR § 76.43.

<sup>9</sup> *Order*, 34 FCC Rcd at 6889-903, paras. 80-110 (Part III.C).

<sup>10</sup> *Id.* at 6904-07, paras. 111-19 (Part III.D).

<sup>11</sup> See 84 FR 44725 (Aug. 27, 2019), <https://www.federalregister.gov/documents/2019/08/27/2019-18230/local-franchising-authorities-regulation-of-cable-operators-and-cable-television-services>.

<sup>12</sup> See Effective Date Public Notice.

<sup>13</sup> *City of Pittsburgh v. FCC*, Case No. 19-3478 (3rd Cir. 2019).

<sup>14</sup> See *City of Eugene v. FCC*, Case No. 19-72219 (9th Cir. 2019); *City of Portland, et al. v. FCC*, Case No. 19-72391 (9th Cir. 2019); *State of Hawaii v. FCC*, Case No. 19-72699 (9th Cir. 2019).

<sup>15</sup> *Alliance for Community Media et al. v. FCC*, Case No. 19-1221 (D.C. Cir. 2019); *City of Chicago v. FCC*, Case No. 19-1226 (D.C. Cir. 2019); *Anne Arundel Cty., Md. et al. v. FCC*, Case No. 19-1225 (D.C. Cir. 2019).

<sup>16</sup> Motion at i.

<sup>17</sup> See *Reed v. Rhodes*, 472 F. Supp. 603, 605 (N.D. Ohio 1979) (“A stay does not reverse, annul, undo, or suspend what has already been done....”). See also *Nken v. Holder*, 556 U.S. 418, 429 (2009) (“A stay simply suspend[s] judicial alteration of the status quo.”) (quotation marks and citation omitted); *Wash. Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 844 (D.C. Cir. 1977) (A “stay pending appeal ... is preventative, or protective; it seeks to maintain the status quo pending a final determination of the merits of the suit.”).

effective date of the *Order*, we cannot find that it is entitled to equitable relief.<sup>20</sup>

**B. NLC Has Failed to Satisfy the Requirements for Obtaining a Stay**

6. When evaluating a stay request, the Commission considers: (1) whether the requesting party has made a strong showing that it is likely to succeed on the merits; (2) whether the requesting party will be irreparably injured without a stay; (3) whether a stay will substantially injure other interested parties; and (4) whether the public interest supports a stay.<sup>21</sup> The third and fourth factors merge where, as here, the federal government is an opposing party.<sup>22</sup> For the reasons set forth below, we find that NLC has failed to satisfy these factors.

**1. NLC Has Failed to Show a Likelihood of Success on the Merits**

7. NLC claims that the *Order*: (1) conflicts with the clear terms of Title VI of the Act;<sup>23</sup> (2) is arbitrary and capricious under the Administrative Procedure Act;<sup>24</sup> and (3) violates the Fifth Amendment and Tenth Amendment to the U.S. Constitution.<sup>25</sup> According to NLC, these claims “raise serious legal questions” and “have more than a fair prospect of success.”<sup>26</sup> We disagree. NLC’s purported “claims” are instead conclusory assertions unsupported by any legal analysis and do not justify a stay.

8. *Alleged Conflict with Title VI of the Act.* NLC’s assertion that the *Order* unreasonably interpreted certain provisions in Title VI of the Act is unlikely to succeed.<sup>27</sup> NLC argues that the Commission’s interpretation of “franchise fee” in section 622(g)(1)<sup>28</sup> of the Act is facially inconsistent with the definition of that term in the statute.<sup>29</sup> The Commission already considered and rejected this argument in the *Order*. As the *Order* explained in detail, both the language and structure of the Act support the Commission’s determination that the term “franchise fee” includes not only monetary assessments, but also in-kind contributions demanded by an LFA, including those that are related to a cable operator’s provision of cable services.<sup>30</sup> NLC’s Motion provides no textual support to rebut the Commission’s statutory interpretation. It also disregards the Sixth Circuit’s holding in *Montgomery*

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<sup>18</sup> See *infra* para. 21.

<sup>19</sup> See *Kay v. Austin*, 621 F.2d 809, 813 (6th Cir. 1980) (under the laches doctrine, a party is not entitled to equitable relief if she does not press her claims expeditiously); *Accord Murphy v. Timberlane Regional School Dist.*, 973 F.2d 13, 16 (1st Cir. 1992).

<sup>20</sup> See *Wreal, LLC v. Amazon.com, Inc.*, 840 F.3d 1244, 1248 (11th Cir. 2016) (“[A] party’s failure to act with speed or urgency in moving for a preliminary injunction necessarily undermines a finding of irreparable harm.”) (cataloguing cases). NLC “request[ed] action on th[e] Motion by October 28, 2019, the deadline for filing for judicial review of the *Order*.” Motion at iii. It thus appears that NLC’s decision whether to intervene in pending court cases – not imminent irreparable harm to franchising authorities – determined the timing of this motion.

<sup>21</sup> *Nken v. Holder*, 556 U.S. 416, 425-26 (2009). See also *Winter v. Nat’l Res. Def. Council*, 555 U.S. 7, 22 (2008).

<sup>22</sup> See *Nken*, 556 U.S. at 435.

<sup>23</sup> Motion at 2, 4-6.

<sup>24</sup> *Id.* at 6-8.

<sup>25</sup> *Id.* at 8-9; U.S. Const. Amend. V; U.S. Const. Amend. X.

<sup>26</sup> Motion at 4.

<sup>27</sup> *Id.* at 4, n.11, citing *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

<sup>28</sup> 47 U.S.C § 542(g)(1).

<sup>29</sup> Motion at 5.

County that the term “franchise fee” encompasses non-cash exactions.<sup>31</sup> Accordingly, NLC has not convinced us that it is likely to succeed in its challenge to the Commission’s interpretation of “franchise fee” in the *Order*.

9. The same is true of NLC’s challenge to the *Order*’s application of the mixed-use rule, which prohibits franchising authorities from regulating cable operators’ non-cable services. NLC contends the mixed-use ruling is unlawful, because nothing restricts local regulation of non-cable services pursuant to sources of authority found outside Title VI of the Act.<sup>32</sup> NLC does not acknowledge that the Sixth Circuit in *Montgomery County* previously upheld the application of the mixed-use rule to incumbent cable operators that are common carriers.<sup>33</sup> In the *Order*, the Commission merely determined that the text, structure, and legislative history of section 624 of the Act required extension of the same rule to incumbent cable operators that are *not* common carriers.<sup>34</sup> Like NLC’s arguments about the franchise fee rulings in the *Order*, its contentions about the mixed-use rule simply revive arguments that were previously rejected by the Commission.

10. We reach the same conclusion with respect to NLC’s claim that the *Order*’s preemption ruling exceeds the bounds of the Commission’s statutory authority.<sup>35</sup> As described in the *Order*,<sup>36</sup> section 636(c) of the Act<sup>37</sup> expressly bestows on the Commission broad authority to preempt conflicting regulation of non-cable services carried over franchised cable systems, irrespective of whether such regulation is imposed pursuant to the cable franchising provisions of Title VI.<sup>38</sup> Because the Commission considered and rejected NLC’s objections to preemption in the *Order*,<sup>39</sup> we find no reason to conclude that NLC’s arguments are likely to prevail on judicial review.

11. Further, we are not persuaded by NLC’s contention that the *Order* bypasses the franchise renewal process set forth in section 625 of the Act<sup>40</sup> by “press[ing] franchising authorities and cable

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<sup>30</sup> *Order*, 34 FCC Rcd at 6849-54, paras. 9-16. In particular, the Commission found that the definition of “franchise fee” in section 622(g)(1) supports interpreting that term expansively and in a way that confers “maximum breadth.” *Id.* at 6852-53, para. 14.

<sup>31</sup> *Montgomery County*, 863 F.3d at 491. We note that the issue remanded to the Commission was whether or to what extent *cable-related* exactions constitute franchise fees. *Order* at 6850-52, para. 12.

<sup>32</sup> *Id.*

<sup>33</sup> *Montgomery County*, 863 F.3d at 493. In the *Order*, the Commission reaffirmed its previous application of the mixed-use rule to preclude LFAs from regulating under Title VI non-cable services offered by incumbent cable operators that are common carriers. *Order*, 34 FCC Rcd at 6879-80, para. 66.

<sup>34</sup> *Id.* at 6883-87, paras. 72-77.

<sup>35</sup> Motion at 5-6.

<sup>36</sup> *Order*, 34 FCC Rcd at 6890-91, para. 81 (finding that section 636(c) “extends beyond the actions of any state or local franchising authority” because the provision, by its terms, preempts laws that conflict with *any* provision of the Act and are imposed by *any* state, political subdivision, or agency thereof). *See also Liberty Cablevision of Puerto Rico, Inc. v. Municipality of Caguas*, 417 F.3d 216, 219-21 (1st Cir. 2005) (stating, among other things, that “Congress has made it ‘unmistakably clear’ [in section 636(c)] that the Cable Act will preempt *any* inconsistent state or local law”).

<sup>37</sup> 47 U.S.C. § 556(c).

<sup>38</sup> NLC’s reliance on *Mozilla v. FCC*, No. 18-1051 (D.C. Cir. Oct. 1, 2019), *reh’g pet. pending*, is misplaced. Motion at 6. The *Mozilla* court drew a distinction between the Commission’s “fail[ure] to ground” its preemption of (continued....)

operators to negotiate informally, and threaten[ing] preemption if franchise authorities refuse.”<sup>41</sup> The *Order* does not “bypass” section 625, because the franchise renewal process in that statutory provision is not applicable in this circumstance. Section 625 allows a cable operator to request a modification of a franchise term where the cable operator demonstrates that the term is “commercially impracticable.” In contrast, the *Order* permits cable operators to request amendment of franchise terms that the Commission in the *Order* found violate the Act.<sup>42</sup>

12. Finally, we note that the *Order* considered and rejected NLC’s claim<sup>43</sup> that the Commission impermissibly substituted the “adequate” standard that applies to cable operators’ PEG obligations in section 621(a)(4)(B) of the Act with the “reasonable standard” that applies to the community “needs and interest” assessment in the franchise renewal process in section 626(c)(1)(D).<sup>44</sup> NLC’s view would mean that the specific restrictions on LFAs’ authority in section 621 – notably, the limit on cable operators’ PEG obligations – would apply to initial franchises but not franchise renewals.<sup>45</sup> NLC provides no statutory or other ground for this distinction, which would enable LFAs to make demands in the franchise renewal process that they were barred from making when the initial franchise was negotiated. In light of the foregoing, we find that NLC has presented no statutory construction argument that is likely to succeed on the merits.

13. *Alleged Arbitrary and Capricious Action.* Also unlikely to succeed is NLC’s assertion that the Commission engaged in arbitrary and capricious action because, among other things, it purportedly failed to consider or address issues in the record, failed to explain its conclusions,<sup>46</sup> and did not base its conclusions on evidence in the record.<sup>47</sup> The *Order* thoroughly explained the Commission’s interpretation of the Act, responded to the major concerns raised by local franchising authorities and other interested parties, and rejected their contrary reading of the statute.<sup>48</sup> We further find no merit to NLC’s claim that the Commission failed to establish that the rules adopted in the *Order* would encourage infrastructure deployment by cable operators.<sup>49</sup> In fact, the Commission considered economic analyses in the record, and ultimately gave greater weight to those positing that a reduction in franchise fees would

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certain local broadband regulation in a source of statutory authority over broadband service, *Mozilla* at \*51, whereas the *Order* invoked the express preemption provision of section 636(c) of the Act to preempt inconsistent local regulation of non-cable services.

<sup>39</sup> *Order*, 34 FCC Rcd at 6896, para. 91.

<sup>40</sup> 47 U.S.C. § 545.

<sup>41</sup> Motion at 6.

<sup>42</sup> *Order*, 34 FCC Rcd at 6877-78, paras. 62-63.

<sup>43</sup> Motion at 6, 12.

<sup>44</sup> See 47 U.S.C. § 541(a)(4)(B), *id.* § 546(c)(1)(D).

<sup>45</sup> *Order*, 34 FCC Rcd at 6870, n. 192.

<sup>46</sup> See, e.g., Motion at 7-8 (asserting that the Commission failed to “grapple with the consequences and statutory inconsistencies caused by its decision to include ‘cable-related in-kind obligations’ in the franchise fee definition”; failed to identify a “rational line between franchise obligations that are a ‘tax, fee or assessment’ and those that are not”; failed to address sufficiently arguments concerning potential public safety issues arising from the *Order*; failed to address record evidence that cable operators already have recovered the cost of their franchise obligations via line-item fees; and failed to provide guidance as to how the fair market value of PEG transport must be calculated).

<sup>47</sup> See, e.g., *id.* (claiming that the Commission’s finding that the *Order* would lead to greater cable system investment was not supported by rational economic analyses).

<sup>48</sup> See, e.g., *Order*, 34 FCC Rcd at 6855-56, 6860-76, paras. 20, 27-58 (explaining, among other things, why its decision to treat cable-related, in-kind contributions as “franchise fees” is harmonious with statutory provisions requiring or authorizing LFAs to impose cable-related obligations on cable franchisees); *id.* at 6874, para. 55, n.221 (continued....)

foster the deployment of new facilities.<sup>50</sup> NLC's disagreement with the Commission's conclusions provides no basis to find that NLC is likely to succeed in establishing that the *Order* is arbitrary and capricious.

14. *Alleged Constitutional Violations.* We also find no merit to NLC's assertion that the *Order* violates the Constitution. NLC argues that the *Order*: (1) violates the Tenth Amendment<sup>51</sup> by directing states and localities to surrender their property and management rights to advance federal policies relating to broadband deployment,<sup>52</sup> and (2) violates the Fifth Amendment<sup>53</sup> by authorizing private use of local property without just compensation.<sup>54</sup> We note that the Commission squarely addressed these constitutional arguments in the *Order*.<sup>55</sup> We likewise find unavailing the argument that the *Order*'s "*ex post facto* modification of franchise contracts confers only a private benefit and offers no public use," which, NLC claims, is an impermissible taking under the Fifth Amendment.<sup>56</sup> Local governments have no property interest in funds that are obtained from cable operators in violation of federal law.<sup>57</sup> Moreover, we reject NLC's claim that bringing franchise agreements into compliance with the law provides no public benefits. As the Commission explained, the *Order* benefits consumers through increased investment in broadband deployment and promotes competition among providers to secure lower prices and higher quality services for consumers.<sup>58</sup>

## **2. NLC Has Failed to Show that Local Governments Will Suffer Irreparable Harm**

15. Even if NLC could demonstrate a likelihood of success on the merits, it would not be entitled to a stay. NLC fails to demonstrate that LFAs would suffer irreparable injury from the *Order* pending appeal, the "single most important prerequisite for the issuance of a preliminary injunction" for a stay.<sup>59</sup> To justify a stay, the claimed injury must be: (1) "actual and not theoretical"; (2) more than mere

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(addressing arguments that treating I-Net requirements as "franchise fees" could create public safety risks); *id.* at 6857-58, para. 22 (addressing line itemization of certain in-kind costs on cable subscribers' bills); *id.* at 6872-74, paras. 53, 55 (explaining that LFAs can choose to continue to receive in-kind contributions or the cash value of those contributions); *id.* at 6889, 6902, paras. 79, 107 (noting that LFAs are entitled to impose public safety regulations on non-cable facilities that are consistent with Title VI); *id.* at 6877, para. 61 (explaining that valuing in-kind contributions at their fair market value best adheres to Congressional intent).

<sup>49</sup> Motion at 8 (arguing that the *Order* failed to address how section 622(e) of the Act, which requires cable operators to pass through to subscribers franchise fee reductions, would facilitate infrastructure deployment).

<sup>50</sup> *Order*, 34 FCC Rcd at 6900, para. 104 and nn.386-88.

<sup>51</sup> U.S. Const. Amend. X.

<sup>52</sup> Motion at 9 (arguing that by precluding local governments from overseeing their rights-of-way, the Commission effectively is commandeering them to grant access to those rights-of way on terms established by the Commission, contrary to the Tenth Amendment).

<sup>53</sup> U.S. Const. Amend. V.

<sup>54</sup> Motion at 9 (arguing that the Commission's decision to preempt regulation of information services provided over franchised cable systems deprives localities of fair and reasonable compensation for use of scarce public rights-of-way).

<sup>55</sup> *Order*, 34 FCC Rcd at 6902-03, paras. 108-10 (addressing arguments that the Commission's preemption ruling violates the Tenth Amendment); *id.* at 6903, para. 110, n.114 (addressing arguments that the Commission's preemption ruling violates the Fifth Amendment).

“economic loss”; and (3) “imminent” and “likely” to occur.<sup>60</sup> NLC does not establish any of these elements.

16. *NLC’s alleged harms are speculative.* NLC posits that irreparable harm will result absent a stay, because reductions in franchise fees stemming from the *Order* will lead to an interruption, reduction, or elimination of the facilities and services provided to municipalities – in particular, I-Nets and PEG access.<sup>61</sup> NLC asserts that LFAs will not have enough time to procure replacements to the (formerly free) facilities and services offered by cable operators (notably I-Nets) or recoup the additional revenue they must now expend to pay for once-free services by taxes and other assessments.<sup>62</sup> We find NLC’s argument to be purely speculative. Though NLC offers examples of seven jurisdictions that allegedly will be irreparably harmed by the *Order*,<sup>63</sup> it does not provide any data about the services and facilities that purportedly will no longer be available in those jurisdictions, the cost to replace free or subsidized services and facilities offered by cable operators, or the size of those municipalities’ budgets. Without that context, we cannot find that the potential injury to LFAs will be “certain” or “great” enough to justify a stay.<sup>64</sup>

17. Further, NLC’s argument ignores local governments’ ability to adjust revenues and expenses in response to changes in franchise fee revenue streams. Any allegedly adverse impact on in-kind contributions caused by the *Order* could be avoided (or at least mitigated) by localities’ own budgeting decisions.<sup>65</sup> For example, if an I-Net is critically important to providing a locality with public safety information, then the LFA can apply its franchise fee to the I-Net and forego a less vital expense. NLC provides no data or other evidence to show that municipalities – either by prioritizing some in-kind contributions over others or by prioritizing in-kind contributions over the fees they would otherwise collect – would be unable to maintain critical facilities and services for the public as result of the *Order*.<sup>66</sup> As the *Order* explained with respect to PEG, “LFAs will still have a choice: they can continue to receive monetary franchise payments up to the five percent cap, they can continue to receive their existing PEG support and reduce the monetary payments they receive, or they can negotiate for a reduction of both that

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<sup>56</sup> Motion at 9.

<sup>57</sup> *Cf. Penn Cent. Transp. Co. v. City of N.Y.*, 438 U.S. 104, 124 (1978) (explaining that the Fifth Amendment does not require compensation for all laws or programs that “adversely affect recognized economic values,” such as uses of the taxing power and government actions not “sufficiently bound up with the reasonable expectations of the claimant to constitute ‘property’ for Fifth Amendment purposes”); *M&J Coal Co. v. U.S.*, 47 F.3d 1148, 1154-55 (Fed. Cir. 1995) (where plaintiff did not acquire the right to mine in such a way as to endanger the public safety, the Government’s actions preventing such endangerment did not take any recognizable property right).

<sup>58</sup> *Order*, 34 FCC Rcd at 6887-88, para. 78, 6900, para. 104. *See also* NCTA Opposition to the Motion for Stay, at 16-17.

<sup>59</sup> *Freedom Holdings, Inc. v. Spitzer*, 408 F.3d 112, 114 (2nd Cir. 2005).

<sup>60</sup> *Nken*, 556 U.S. at 434-35 (“[S]imply showing some ‘possibility of irreparable injury’ fails to satisfy the second factor” of the test for granting a stay) (emphasis added); *Wisc. Gas v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 2015).

<sup>61</sup> Motion at 14-17.

<sup>62</sup> *Id.* at 16-17.

<sup>63</sup> *Id.* at 12-19.

<sup>64</sup> *Wisc. Gas*, 758 F.2d, 674 (to demonstrate irreparable harm “the injury must be both certain and great; it must be actual and not theoretical”).

<sup>65</sup> We note that the Commission in the *Order* also mitigated potential threats to public safety by clarifying that under section 636(a) of the Act, 47 U.S.C. § 556 (a), LFAs may impose requirements on non-cable facilities and equipment designed to protect public safety, so long as such requirements otherwise are consistent with Title VI. *Order*, 34 FCC Rcd at 6889, para. 79.

fits within the bounds of the law that Congress adopted.”<sup>67</sup>

18. *NLC’s claimed injuries are economic and thus do not constitute irreparable harm.* NLC’s assertion that the *Order* will jeopardize the continuing availability of critical facilities and services (e.g., I-Nets, PEG channels, and free cable service to schools and government buildings) fails to demonstrate irreparable harm. As courts have long held, “economic loss does not, in and of itself, constitute irreparable harm.”<sup>68</sup> To be sure, as a result of the *Order*, LFAs may have to adjust their demand for franchise fees and other contributions by cable operators to be consistent with the Act, as interpreted by the Commission. But that is simply a complaint that LFAs might, only in the absence of other revenue or expense adjustments, pay more for the services that they currently receive from the cable operators – i.e., the type of monetary loss that does not give rise to irreparable harm. Also, as NLC concedes, cable operators can repay franchise fees to LFAs, if needed to give effect to a reviewing court’s determination that the franchise fee rulings in the *Order* are unlawful.<sup>69</sup> “The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation weighs heavily against a claim of irreparable harm.”<sup>70</sup>

19. We also are not convinced that the administrative and legal costs LFAs allegedly will incur to comply with the *Order* warrants a stay.<sup>71</sup> NLC’s concerns appear to center around LFAs’ purported inability to recoup costs associated with having to renegotiate franchise agreements or renewals as a consequence of the *Order*.<sup>72</sup> Courts, however, have repeatedly held that compliance costs are a necessary expense and do not constitute the type of irreparable injury required to justify the extraordinary remedy of a stay.<sup>73</sup> That is so even if LFAs have to renegotiate franchise agreements a second time, should the *Order* fail to withstand judicial scrutiny. Regardless, NLC offers no context for how much time and money LFAs will expend to amend existing franchise agreements, as compared to the time and money they would have spent in the normal course. Without that information, we cannot determine what (if any) effect the *Order* will have on LFAs’ compliance costs, and thus we cannot find that those costs rise to the level of irreparable harm.

20. Likewise, any increase in the legal costs LFAs will incur to negotiate franchise terms does not warrant a stay, because the Courts have similarly held that “mere litigation expense, even

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<sup>66</sup> NLC asserts that the *Third Report & Order*’s “assum[ption] that LFAs can comply with the Order simply by allowing the deduction from franchise fees of the “fair market value” if their I-Nets ... ignores the likelihood that many LFAs will be required to undertake a procurement process required by state and local law for these services rather than simply paying the cable operator.” Motion at 16. Critically, NLC does not explain why LFAs would have to go through the procurement process.

<sup>67</sup> *Order*, 34 FCC Rcd at 6873, para. 54.

<sup>68</sup> *Wisc. Gas*, 758 F.2d at 674; *accord DISH Network Serv. L.L.C. v. Laducer*, 725 F.3d 877, 882 (8th Cir. 2013) (“Economic loss, on its own, is not an irreparable injury so long as the losses can be recovered.”).

<sup>69</sup> Motion at 21-22.

<sup>70</sup> *Chaplaincy of Full Gospel Churches*, 454 F.3d 290, 297-98 (quoting *Virginia Petroleum Jobbers Ass’n v. Federal Power Comm’n*, 259 F.2d 921, 925 (D.C. Cir. 1958)).

<sup>71</sup> *See, e.g.*, Motion at 11-12 (“The *Order*’s new interpretation ... will require ... incurring significant additional expense. . . .”); *id.* at 12 (arguing that there is no clear mechanism to recover the costs of repeated negotiations); *id.* at 13 (referencing LFAs’ inability to recoup “administrative and legal costs” resulting from franchise renegotiations).

<sup>72</sup> *Id.* at 12.

<sup>73</sup> *See Freedom Holdings*, 408 F.3d at 115 (“[O]rdinary compliance costs are typically insufficient to constitute irreparable harm.”); *Am. Hosp. Ass’n v. Harris*, 625 F.2d 1328, 1331 (7th Cir. 1980) (“[I]njury resulting from attempted compliance with government regulation ordinarily is not irreparable harm”).



substantial and unrecoupable cost, does not constitute irreparable injury.”<sup>74</sup> Were that not the case, NLC still has not demonstrated irreparable harm, because it has presented no evidence that LFAs’ litigation expenses will substantially increase as a result of the *Order*. Though NLC attached to its Motion a pleading made by Comcast in a franchise renewal proceeding asserting that Comcast’s new franchise agreement must conform to the rules adopted in the *Order*, that proceeding was underway when the Commission adopted the *Order*; thus, any increase in the LFA’s legal expenses from the Commission’s actions will be incremental.<sup>75</sup> Finally, NLC’s irreparable harm claim is based on speculation that an unsubstantiated number of LFAs and cable operators will litigate rather than renegotiate the terms in franchise agreements to conform to the *Order*.

21. *NLC Fails to Show Immediacy of Harm.* Petitioners seeking a stay must show “[t]he injury complained of is of such imminence that there is a ‘clear and present need’ for equitable relief to prevent irreparable harm.”<sup>76</sup> NLC fails to show that any potential harm is “imminent.” NLC has not, and cannot, show that the *Order* will immediately reduce or eliminate services currently provided to municipalities. The rules in the *Order* did not supersede provisions in existing franchise agreements on their effective date (September 26, 2019). Instead, the *Order* encouraged LFAs, in response to a request from a cable operator, to negotiate franchise terms that conform to the *Order* in a reasonable amount of time, which the Commission found in most cases would be no more than 120 days.<sup>77</sup> Thus, for example, an LFA is not required to assess the costs of in-kind contributions that it currently receives from a cable operator (e.g., free cable service) against the franchise fee until the cable operator asks the LFA to amend the terms of its franchise. At that point, the LFA and the cable operator have 120 days to renegotiate the franchise agreement. If negotiations fail, the terms in the franchise remain in effect unless and until a cable operator challenges those terms and proves that the terms violate the *Order*’s requirements. NLC fails to explain why it is unreasonable to expect a cable operator and an LFA to renegotiate franchise terms within 120 days.<sup>78</sup>

### 3. A Stay Would Harm Other Parties and Be Contrary to the Public Interest

22. NLC contends that maintaining the Commission rules and policies in effect prior to the *Order* would enable all parties, including cable operators, to avoid the costs resulting from conformance to the *Order*.<sup>79</sup> NLC, however, mischaracterizes the *status quo*. Because the *Order* had been effective for two weeks when NLC requested a stay, granting NLC’s motion would, in fact, alter the *status quo*. Since the *Order* was released on August 2, 2019, cable operators (and, presumably, LFAs) should have been evaluating the effect of the *Order* on existing franchise agreements, and whether and what steps they must take to amend those agreements to conform to the rules adopted in the *Order*. Indeed, NLC’s Motion demonstrates that at least one cable operator has sought to invoke the *Order*’s provisions in a pending franchise renewal proceeding.<sup>80</sup> If NLC believed that LFAs would suffer irreparable harm from the new rules, it should have timely sought a stay before they took effect. It would be contrary to the public

<sup>74</sup> *Renegotiation Bd. v. Bannercrest Clothing Co.*, 415 U.S. 1, 24 (1974); accord *Standard Oil Co. of Calif. v. FTC*, 449 U.S. 232, 244 (1980) (“the expense and annoyance of litigation ‘is part of the social burden of living under government.’”) (quoting *Petroleum Exploration, Inc. v. Public Service Comm’n*, 304 U.S. 209, 222, (1938)).

<sup>75</sup> Motion at 12-13.

<sup>76</sup> *Wisconsin Gas*, 758 F.2d at 674; see *Minnesota Vikings Football Stadium, LLC v. Wells Fargo Bank*, 157 F. Supp. 3d 834 (D. Minn. 2016) (“Speculative injury is insufficient to justify a preliminary injunction, and a moving party’s long delay after learning of the threatened harm may indicate that the harm is neither great nor imminent.”).

<sup>77</sup> *Order*, 34 FCC Rcd at 6877-78, para. 62, n.247.

<sup>78</sup> Because NLC has failed to demonstrate that it is likely to succeed on the merits of its constitutional claims, we conclude that such claims similarly are insufficient to establish irreparable harm. See *supra* para. 14.

<sup>79</sup> Motion at 20.

<sup>80</sup> *Id.* at 12-13.

interest to allow NLC to waste the time and resources of those entities that have been diligently taking steps to comply with the rules adopted in the *Order*.

23. Even if NLC had timely filed its Motion, we find that it would not be in the public interest to stay the effectiveness of our rules. A stay would allow LFAs to collect fees and other compensation that exceed the 5 percent cap on cable operators' franchise fees, in violation of the Act. It also would permit LFAs to regulate cable operators' non-cable services, notwithstanding the statutory bar against doing so. Particularly given NLC's failure to seek a stay before the effective date of the rules adopted in the *Order*, we see no reason to take the extraordinary step of granting equitable relief so that LFAs can continue to charge fees and impose requirements that the Commission has found are prohibited under the Act. For the foregoing reasons, we conclude that a stay of the *Order* would be contrary to the public interest. We, therefore, deny NLC's Motion.

### III. ORDERING CLAUSES

24. Accordingly, **IT IS ORDERED THAT**, pursuant to the authority contained in sections 4(i), 4(j), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i)-(j), and 303(r) and the authority delegated in sections 0.61 and 0.283 of the Commission's rules, 47 CFR §§ 0.61 and 0.283, this Order Denying Motion for Stay in MB Docket No. 05-311 **IS ADOPTED**.

25. It is **FURTHER ORDERED** that the Motion for Stay pending judicial review of the Third Report and Order in this proceeding, filed by the National League of Cities, *et al.*, **IS DENIED**.

26. It is **FURTHER ORDERED** that this Order Denying Motion for Stay **SHALL BE EFFECTIVE** upon its release.

FEDERAL COMMUNICATIONS COMMISSION

Michelle M. Carey  
Chief  
Media Bureau